

**BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE**

In the Matter of the Appeal of Brendan M. Dolan

Hearing Dates: November 30, 2016
December 1, 2016

Hearing Location: City Hall, 200 E. Wells Street, Milwaukee, Wisconsin,
Room 301-A, 8:30 A.M.

Commissioners: Kathryn A. Hein
Angela McKenzie, Esq.
Steven M. DeVougas, Esq.

Hearing Examiner: Rudolph M. Konrad, Esq.

Appearances: For the Milwaukee Police Department,
Robin A. Pederson, Esq.
Office of the City Attorney

For Brendan M. Dolan,
Attorney Brendan Matthews, Esq.
Cermele & Matthews, S.C.

PROCEDURAL HISTORY

In Personnel Order 2016-50, dated April 20, 2016, Chief of Police Edward A. Flynn found Brendan M. Dolan guilty of violating the Milwaukee Police Department Core Value 1.00, Competence, Referencing Guiding Principle 1.04, which requires investigations of crimes to be conducted and reports to be prepared “in prompt, thorough, impartial and careful manner.” The Chief found that Dolan failed to thoroughly investigate a crime reported to him and failed to enter follow-up data and alerts in a timely manner as required by department procedures. For this violation the Chief demoted him from the rank of detective to the rank of police officer. Dolan appealed the Chief’s order to the Milwaukee Fire and Police Commission.

SUMMARY OF HEARING PROCEEDINGS

A hearing was held and recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Police Chief: Police Officer Brendan M. Dolan
Sergeant Thomas Hines
Lieutenant Justin Carloni
Assistant Chief of Police Carianne Yerkes

For the Appellant: Captain Aimee Obregon
Lieutenant Madreia De La Cruz
MPA Liaison Shawn Lauda
Captain Shunta Boston-Smith (stipulated testimony)
Assistant District Attorney Molly Schmidt (stipulated testimony)

FINDINGS OF FACT

We find the following facts have been established by a preponderance of the evidence.

1. On July 19, 2015, Stephen Robinson was identified as a suspect in the 2nd degree sexual assault of EB, which had occurred on July 17, 2015. When questioned about the EB assault, Robinson confessed to the assault of EB and to the sexual assault of another victim, VK, which occurred three months earlier on April 13, 2015. (Exhibit 9, Bates 250-252).
2. An investigation into the assault of VK had been conducted by the MPD. In the course of that investigation, a latent fingerprint was recovered at the crime scene. On April 14, 2015, the recovered fingerprint was identified as the print of Stephen Robinson. (Exhibit 9, Bates pp. 240-241). On the same day, Lt. Justin Carloni, supervisor of the Sensitive Crimes Division (SCD), assigned then Detective Brendan Dolan to be lead investigator of the VK assault. Dolan created a photo array including a photo of Robinson and met with VK on the 14th or 15th, but VK was unable to identify him. (Exhibits 7 & 9). During the SCD April 15th weekly briefing led by Lt. Carloni, and attended by Dolan and others, the investigation of the VK assault was discussed. At the briefing, Lt. Carloni directed Dolan to find Robinson and interview him. (Exhibits 2 & 13; Carloni Testimony). Dolan understood he needed to interview VK again, and find Robinson to interview him about his fingerprint. He knew that if he was unable to locate Robinson after a reasonable effort and within a short period of time, he should enter an investigative alert for him to be interviewed about the VK assault.
3. Dolan failed to interview Robinson, failed to make additional efforts to locate him, and failed to enter an Investigative Alert (IA) into the National Crime Information Center (NCIC). He also failed to enter the required follow-up into the SCD's SharePoint system. (Exhibits 1 & 4). A follow-up entry in the SCD's SharePoint system would have instructed other detectives to attempt to locate Robinson. An entry into NCIC would have alerted other officers that detectives wanted to interview him.
4. Under established SCD practice, Dolan should have entered a follow-up folder into the SharePoint system to locate and interview Robinson and he should have entered an IA

into the NCIC. These practices were implemented in January 1, 2015, and had been explained by supervisors at weekly briefings and at Roll Calls since then. (Exhibit 4).

5. Dolan acknowledged he did not enter an IA for Robinson into the NCIC and that he should have done so in his PI-21 interview, his response to charges, and in his hearing testimony. He also acknowledged he did not enter the follow-up information regarding locating and interviewing Robinson in the SCD's SharePoint system, and characterized his failures as a "mistake." (Exhibit 19).
6. MPD officers had six separate field contacts with Robinson during the time between the assault of VK and the assault of EB, but did not detain him. (Exhibit 22, Bates 28-29; Exhibit 26). The officers did not know he was to be interviewed about the VK assault case because no IA was entered in the NCIC. Whether or not the EB assault would have been prevented had any of those officers made contact with Robinson in the interim cannot be established conclusively. It should be noted, however, that when Robinson was questioned about the EB assault, he confessed to it and to the VK assault.
7. On July 21, 2015, Lt. Carloni sent a memo to Captain James Shepard reporting Dolan's failure to enter and complete the follow-up in accordance with procedure. (Exhibit 4). The memo states that if the allegations stated in the memo are true, Dolan had violated competency core values and governing principles. Lt. Carloni, as Dolan's supervisor, also instructed Dolan of the tasks he expected him to perform as part of his duties. He imposed no discipline on Dolan.
8. In light of Dolan's failure, Lt. Carloni, on July 22, 2015, audited all of the open stranger sexual assault investigations assigned to Dolan. (Exhibit 11). He undertook the audit as a supervisor to correct any errors and prevent future errors. He did not conduct the audit as part of a disciplinary investigation or with the intent to discipline Dolan. (Exhibit 13; Carloni Testimony).
9. On July 27, 2015, Lt. Carloni conducted an employee counseling session with Dolan regarding his failure to enter follow-up data into the SCD SharePoint system in reference to a case involving an assault on TS. In that case, Dolan failed to enter open and required follow-ups into the SharePoint system. Dolan admitted he had failed to enter follow-up information. Dolan affirmed that he knew how to make the appropriate entries and that detectives had been required to do so since January 1, 2015, but that he forgot to do so. Dolan took responsibility for his failures and indicated that it would not happen in the future. He was given a list of incomplete follow-ups and stated he would complete them in a timely manner. (Exhibit 10).
10. During the counseling session Lt. Carloni did not mention the VK assault or the related EB assault because he was aware of the pending internal affairs investigation of Dolan related to those matters. He did not discuss with anyone whether Dolan should be disciplined for those matters, for any other matters, or for his collective investigative failures. Neither Carloni nor Dolan considered the counseling session to be an imposition of discipline on Dolan. (Exhibit 13; Dolan Testimony; Carloni Testimony).

CONCLUSIONS OF LAW

11. This appeal is governed by the seven “just cause” standards set forth in Wis. Stat. sec. 62.50(17) (b). The Commission must find by a preponderance of the evidence that there is just cause to sustain the charges. Preponderance of the evidence means “more likely than not,” rather than just possible. See, e.g., *U.S. v. Johnson*, 342 F.3d 731, 734 (7th Cir. 2003). We conclude that standards one through six are satisfied with respect to the charges against Dolan. In reference to the seventh standard, we conclude that the preponderance of evidence supports a 30-day non-paid suspension.
12. The first just cause standard asks, “whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct.” At the time of this incident, Brendan Dolan had been a police officer for five and a half years and a detective in the Sensitive Crimes Division for one year and three months; accordingly, he should have known that failure to conduct a thorough investigation and failure to enter critical follow-up information and alerts in the department’s data systems could result in persons who would otherwise be arrested committing other crimes. (Exhibits 39 & 46). Lt. Carloni testified that the importance of entering follows-up to insure unfinished investigative work is completed promptly was repeatedly noted at briefings and Roll Call. Moreover, Dolan never testified or argued that he did not know the possible consequence of his inaction. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.
13. The second just cause standard asks, “whether the rule or order the subordinate allegedly violated is reasonable.” Core Value 1.00 – Competence, holds department members accountable for the quality of their performance. Guiding Principle 1.04 requires department members to conduct investigations and prepare reports promptly, thoroughly, and carefully. (Exhibit 23). We have no difficulty concluding that the competency core value is reasonable. It is not necessary to explain at length the self-evident reasons that the competency policy is reasonable. The competency core value is central to effective law enforcement. Without prompt, thorough, and careful police investigations, many suspects would not be apprehended, and many of those apprehended would not be convicted. Moreover, Dolan made no argument that this rule is in any way unreasonable. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.
14. The third just cause standard asks: “whether the Chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate the rule or order.” Sgt. Thomas Hines testified regarding the effort made to investigate this case, which is recorded in his summary of the investigation. (Exhibit 22). His investigation did contain some incorrect dates, but none of the errors went to the substance of the investigation. Moreover, Dolan submitted his response to the charge to the Chief admitting his error. (Exhibit 19). We conclude the Chief has satisfied the third standard by a preponderance of the evidence

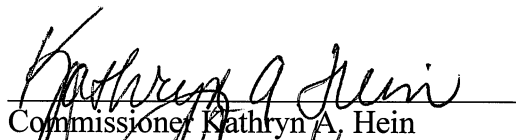
15. The fourth just cause standard asks, “whether the effort was fair and objective.” Reviewing the entire record in this matter, we find no evidence of any animus directed against Dolan. Lt. Carloni, who provided the facts of Dolan’s investigation into the VK assault to the Captain, certainly displayed no animus when he described Dolan as an above average detective. (Exhibit 35). Dolan’s attorney did attempt to cast some blame on the leadership of the Sensitive Crimes Division and implied Dolan was disciplined in part to absolve the leadership of the division of blame, but that attempt was unpersuasive. In reference to follow-ups and alerts, the evidence is clear that all detectives in that division were instructed and directed to enter follow-ups and alerts into SharePoint and NCIC. (Exhibits 17 & 18). Dolan himself admitted he knew he should have entered the VK related follow-ups and alert into SharePoint and NCIC. (Exhibit 19). The Chief has satisfied the fourth standard by a preponderance of the evidence.
16. Dolan has raised another issue concerning the fairness of the process. Specifically, Dolan filed a motion to declare his demotion from detective to police officer unlawful as a matter of law on the grounds of double jeopardy. The Commission noted in the *Appeal of Daniel J. Vidmar*, June 26, 2014, that, although the Fifth Amendment Double Jeopardy Clause does not apply to Fire and Police Commission proceedings, a number of nonbinding labor arbitration cases hold that a similar doctrine applies in cases involving a just cause standard. Those authorities, the Commission noted, “reason that it is fundamentally unfair to impose two separate disciplinary sanctions on an employee for the same conduct, and that this unfairness precludes a finding of just cause for the second sanction.”
17. In *Vidmar*, the Commission, recognized that the labor arbitration cases were not binding on it, nevertheless, the Commission accepted for the sake of argument that the imposition of a second discipline for the same conduct would be unfair and in violation of the fourth just cause standard. Accordingly, the Commission considered whether Vidmar was in fact disciplined earlier for the same conduct that was the subject of one of the charges in that proceeding. We will follow the same course here.
18. Dolan’s brief argues that double jeopardy attaches here because Lt. Carloni conducted a counseling session with Dolan on July 27, 2015, in which he directed him to correct his omissions. The counseling session arose out of omissions Carloni found in an audit of Dolan’s stranger sexual assault files. The omissions appeared in the investigation of an assault on TS. During the counseling session, Lt. Carloni did not mention the VK assault or the related EB assault because he was aware of the pending internal affairs investigation of Dolan related to those matters. He did, however, discuss the same kind of omissions: failure to enter data in SharePoint. Carloni did not discuss with anyone whether Dolan should be disciplined for the omissions discussed during the counseling session, or for any other matters, or for his collective investigative failures, nor did he discipline him. Moreover, Carloni did not consider the counseling session to be disciplinary in nature. Dolan claims in his motion that the counseling session and directive constituted discipline and was accepted by Dolan and Carloni as such. At the hearing, however, Dolan testified that he did not consider the counseling session to be disciplinary. (Exhibits 10, 11, 13, 19; Carloni Testimony; Dolan Testimony).

19. Irrespective of Dolan's admission, however, a counseling session in general and the counseling session in this case, do not fit into the conventional definition of discipline. Webster defines the meaning of "discipline" as "to inflict suffering on or to penalize for the sake of discipline, regularity, order, or rule." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 645 (1971). The definition in BLACK'S LAW DICTIONARY gives the legal meaning of the term. Black defines "discipline" as "[p]unishment intended to correct or instruct, esp. a sanction or penalty imposed after an official finding of misconduct." BLACK'S LAW DICTIONARY (10th ed. 2014). The common definition of "discipline" involves an affirmative act of punishment. The legal definition adds the requirement that the punishment be imposed after an official finding of misconduct. Under either definition, the Carloni-Dolan counseling session was not discipline.
20. The motion to dismiss on double jeopardy grounds is denied.
21. The fifth just cause standard asks, "whether the Chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate." Dolan was named the lead investigator into the VK assault. After he obtained the fingerprint evidence identifying Robinson, he showed VK a photo array that included Robinson but VK did not identify him as her assailant. Dolan admitted in his PI-21 interview, in his response to the charges, and in his testimony, that he did not enter the follow-up information regarding locating and interviewing Robinson in the SCD SharePoint system and that he should have done so. He also admitted that he did not enter an IA for Robinson into the NCIC and that he should have done so. He said his failure to make these entries was a "mistake." The record also established that he made no further efforts to locate Robinson after he showed the photo array to VK. The Chief has satisfied the fifth standard by a preponderance of the evidence.
22. The sixth just cause standard asks, "whether the Chief is applying the rule or order fairly and without discrimination against the subordinate." As discussed above, we find a thorough investigation was conducted with no credible evidence of animus against Dolan. The testimony of Assistant Chief of Police Carianne Yerkes and the Discipline Review Summary and the supporting documents establish the considerations, both aggravating and mitigating, that were presented for the Chief's consideration, and we find nothing unfair or improper about any of them. (Exhibit 37). We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.
23. The seventh and final just cause standard asks, "whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the department." The Commission finds that the proposed discipline reasonably relates to the seriousness of the alleged violation, but finds that as a new detective to the SCD that recently passed probation before this happened, Dolan's record of service warrants a suspension rather than a demotion. Every witness who testified about his performance as a detective, including Lt. Carloni, testified it was above average. His performance reviews also rated his performance as above average. (Exhibit

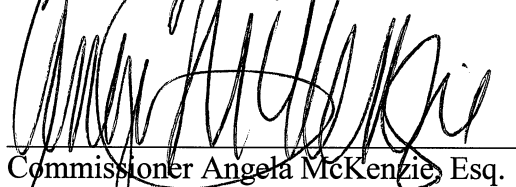
35, 38-40). In the case of Detective Amy Stolowski, who also had positive performance reviews, the Commission reduced the Chief's order of demotion to a 20-day suspension. (Exhibit 41, Bates 318). In that case, Stolowski waited almost two months after receiving a DNA match to present the case to the District Attorney's Office while conducting other follow-up activities. In this case, however, Dolan failed to take several actions that might have resulted in the earlier apprehension of Robinson. Accordingly, the Chief's demotion order is modified to a 30-day non-paid suspension.

DECISION

The Appellant, Brendan M. Dolan, is ordered a non-paid suspension from the Milwaukee Police Department for a period of 30-days.


Commissioner Kathryn A. Hein

12/15/16
Date


Commissioner Angela McKenzie, Esq.

12/15/16
Date


Commissioner Steven M. DeVougas, Esq.

12-15-16
Date